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Law Offices Of

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A Limited Liability Partnership

May 30, 2006

Office of the Clerk
Supreme Court of the United States
1 First Street NE
Washington, D.C. 20543
202-479-3031

VIA PRIORITY U.S. MAIL

Re: **Abdul-Kabir v. Dretke, No. _____**
(DEATH PENALTY CASE)

Dear Sir or Madam:

Enclosed for filing in the above-styled death penalty habeas corpus proceeding please find an original and ten (10) copies of Petitioner Jalil Abdul-Kabir's **Application for Leave to Proceed *In Forma Pauperis***, his **Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit** with accompanying **Appendices**, and the **Certificate of Service** confirming service of these pleading upon counsel for Respondent.

By copy of this letter, I am serving Respondent's counsel with copies of these pleadings.

Thanks very much for your kind assistance.

Sincerely,

Robert C. Owen
Counsel for Jalil Abdul-Kabir

cc: AAG Carla Eldred
Mr. Jalil Abdul-Kabir

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2005

JALIL ABDUL-KABIR,
Petitioner,

-v-

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

APPLICATION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner JALIL ABDUL-KABIR, formerly known as Ted Calvin Cole, by counsel, respectfully asks leave to file the accompanying Petition for Writ of *Certiorari* to the United States Court of Appeals for the Fifth Circuit without prepayment of costs and to proceed *in forma pauperis*. Petitioner (using his former name) proceeded *in forma pauperis* in federal district court and on appeal, with counsel in both proceedings appointed under 21 U.S.C. § 848(q)(4)(B). *See* Sup. Ct. R. 39.

Respectfully submitted,

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JALIL ABDUL-KABIR,
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DOUG DRETKE, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THIS IS A CAPITAL CASE.

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QUESTIONS PRESENTED

CAPITAL CASE

1. Do the former Texas "special issue" capital sentencing jury instructions – which permit jurors to register only a "yes" or "no" answer to two questions, inquiring whether the defendant killed "deliberately" and probably would constitute a "continuing threat to society" – permit constitutionally adequate consideration of mitigating evidence about a defendant's mental impairment and childhood mistreatment and deprivation, in light of this Court's emphatic statement in Smith v. Texas, 543 U.S. 37, 48 (2004), that those same two questions "had little, if anything, to do with" Smith's evidence of mental impairment and childhood mistreatment)?

2. Do this Court's recent opinions in Penry v. Johnson, 532 U.S. 782 (2001) ("Penry II") and Smith, both of which require instructions that permit jurors to give "*full* consideration and *full* effect" to a defendant's mitigating evidence in choosing the appropriate sentence, preclude the Fifth Circuit from adhering to its prior decisions – antedating Penry II and Smith – that reject Penry error whenever the former special issues might have afforded some indirect consideration of the defendant's mitigating evidence?

3. Has the Fifth Circuit, in insisting that a defendant show as a predicate to relief under Penry that he suffers from a mental disorder that is severe, permanent or untreatable, simply resurrected the threshold test for "constitutional relevance" that this Court emphatically rejected in Tennard v. Dretke, 542 U.S. 274 (2004)?

4. Where the prosecution, as it did here, repeatedly implores jurors to "follow the law" and "do their duty" by answering the former Texas special issues on their own terms and abjuring any attempt to use their answers to effect an appropriate sentence, is it reasonably likely that jurors applied their instructions in a way that prevented them from fully considering and giving effect to the defendant's mitigating evidence?

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2005

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-v-

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Texas death row prisoner JALIL ABDUL-KABIR (hereafter "Petitioner"), formerly known as Ted Calvin Cole,[1] respectfully asks this Court to grant a writ of *certiorari* to review the judgment on remand of the United States Court of Appeals for the Fifth Circuit in his case.

OPINIONS BELOW

In November 2004, this Court granted *certiorari* in Petitioner's case and directed the Fifth Circuit to reconsider its denial of relief in light of Tennard v. Dretke, 542 U.S. 274 (2004). Abdul-Kabir v. Dretke, 543 U.S. 985 (2004). The court below adhered to its prior judgment on remand. Cole v. Dretke, 418 F.3d 494 (5th Cir. 2005) (attached as Appendix A). Rehearing *en banc* was

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[1] All relevant court documents and records in this case refer to Petitioner by his former name, Ted Calvin Cole.

denied over dissent. Cole v. Dretke, 443 F.3d 441 (5th Cir. 2006) (attached as Appendix B). The District Court's unpublished memorandum opinion, Cole v. Johnson, No. 6:00-CV-014C (N.D. Tex., March 6, 2001), is attached as Appendix C.

JURISDICTION

The Fifth Circuit entered judgment on remand on July 22, 2005, and denied rehearing *en banc* on March 17, 2006. This Petition is timely filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment guarantee against cruel and unusual punishment, applicable against the States through the Fourteenth Amendment's due process clause, and the pre-1991 version of the Texas capital sentencing statute, Tex. Code Crim. Proc. art. 37.071. Appendix D contains the text of each.

STATEMENT OF THE CASE

A. Procedural History

On June 3, 1988, a Texas jury convicted Petitioner of capital murder for intentionally killing Raymond C. Richardson in the course of committing robbery. The following day, that jury returned affirmative answers to the two special issue questions submitted pursuant to former Tex. Code Crim. Proc. art. 37.071, and the court imposed the death penalty as mandated by that statute.

Petitioner's conviction and sentence were affirmed on appeal. Cole v. State, No. 70,401 (Tex. Crim. App., Sept. 26, 1990) (unpublished), *cert. denied*, Cole v. Texas, 499 U.S. 982 (1991). The state courts thereafter denied post-conviction relief. *Ex parte* Cole, No. 41,674-01 (Nov. 24, 1999) (unpublished).

Petitioner sought federal habeas relief, which the District Court denied. *See* Appendix C. Petitioner appealed; the Fifth Circuit affirmed. This Court vacated that judgment and remanded for further consideration in light of Tennard. The Fifth Circuit adhered to its prior decision and refused rehearing *en banc* over dissent. *See* Appendices A, B. This Petition follows.

B. Facts Material to Consideration of the Question Presented

Petitioner was convicted of killing Raymond C. Richardson during a robbery. Two others took part in the crime: Petitioner's step-brother Michael Hickey and Hickey's wife Christina, the victim's granddaughter. *See generally* RR XV at 417-461.[2] Immediately before the crime, the three were transients, "squatting" in an abandoned motel in San Angelo, Texas. RR XV at 422. On December 13, 1987, the trio went to Richardson's house and visited with him for a couple of hours. Id. at 439. At some point, while Richardson was unawares, Petitioner pushed him to the floor from behind; he then strangled him with a dog leash while sitting on his back. Id. at 442-445. Michael Hickey took all the cash in Richardson's wallet – twenty dollars – and the three spent it on food. Id. at 295, 298, 449. The next morning, the Hickeys surrendered to police and implicated themselves and Petitioner. Id. at 454.[3] By midafternoon, Petitioner had been arrested in Richardson's home and had confessed his own role in the crime. Id. at 292-299.

At the penalty phase, the jury heard evidence detailing how Petitioner was deprived, neglected, abandoned, and mistreated as a child, as well as expert testimony about how those

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[2] We cite the transcript of testimony fromt Petitioner's trial as "R.R." ("Reporter's Record") and the pleadings, orders, etc., of the trial court as "C.R." ("Clerk's Record"). *See* Tex. R. App. Proc. 34 and notes and commentary thereto (defining "Clerk's Record" and "Reporter's Record").

[3] Christina Hickey eventually pleaded guilty and received a 40-year sentence for testifying against Petitioner. Michael Hickey, who did not testify, pleaded guilty and received a sentence of 60 years.

experiences had left him with lasting emotional and psychological scars. In addition, the jury heard expert testimony that Petitioner suffers likely neurological dysfunction that impairs his ability to control his impulses.

Petitioner's mother Nancy Doris Hickey described the trauma and despair that characterized her son's life. Mrs. Hickey was an alcoholic and her drinking made her unable to care for her children. RR XVII at 772. Shortly after Petitioner was born, his father was arrested for robbing a liquor store. Id. at 770. Before Petitioner was five years old, his father abandoned the family. Id. at 771. Mrs. Hickey vividly described Petitioner's last meeting with his father:

> The last time he saw his father, his father brought him to San Angelo. He had took him off to Abilene and brought him to San Angelo and dropped him off a block from where he thought I lived and said, "Your mother lives down in that block. Go find her," and drove off. That's the last time he [saw] his father.

Id. at 776. Petitioner did not see his father again for ten years. Id.

Mrs. Hickey told the jury that after Petitioner's father abandoned the family, she worked at a "beer joint for three dollars a day and had two kids to feed." Id. at 771. Unable to manage her life and to care for her children, she took them to Oklahoma to live with her parents. Id. Both Mrs. Hickey's parents were also alcoholics and they did not want her or the children to live with them. Id. Their house was eight miles outside town and Petitioner, then just five years old, was completely isolated from other children. The school buses did not run in that area and Mrs. Hickey's father refused to let her use his car to transport Petitioner to and from school. Id. Petitioner's mother therefore placed him in a church-run children's home. Id. at 772-73. Although Petitioner remained there for the next five years, his mother visited him only twice. Id.

Petitioner's aunt Barbara Ann Dean testified that when Petitioner visited her family on

holidays during the five years he lived away from his family in the children's home, he seemed incapable of expressing his feelings. Id. at 790. She added that Petitioner's father never visited him at all. Id.

Psychologist Jarvis Wright, Ph.D., who had spent more than ten hours interviewing and evaluating Petitioner on several different occasions, testified that Petitioner had endured a "very rugged, rough childhood." Id. at 806. In Dr. Wright's professional opinion, Petitioner showed evidence of having experienced "a bad, very painful background," and of continuing to endure great emotional pain as an adult. Id. at 807. Dr. Wright explained that Petitioner had "never felt loved and worthwhile in his life," and as a result experienced "terrific needs for nurturance" and suffered from a "fragmented personality" and "chronic depression." Id. at 807, 824-25. He also testified that Petitioner, while awaiting trial, was so "distressed" and "distraught" that he tried to kill himself by cutting his own throat. Id. at 806.

In addition to the undisputed evidence of childhood neglect and abandonment, Petitioner also presented evidence that he suffered from diminished impulse control. Id. at 809. Dr. Wright described Petitioner as "lack[ing] a great deal of impulse control," as a result of a combination of factors including "his history," "the pain in his life," and a likely "neurological dysfunction in the central nervous system." Id. at 808-09. The latter condition was indicated by Petitioner's results on a battery of psychological and neuropsychological tests administered by Dr. Wright prior to trial; on some such tests, Petitioner scored in the bottom five percent of the population. Id. at 802-805, 809, 815. Based on Petitioner's performance on those tests, as well as Dr. Wright's own observations of Petitioner under various circumstances, Dr. Wright concluded that Petitioner suffers from damage to his central nervous system which greatly diminishes his impulse control. Id. at 808, 811. As Dr.

Wright testified:

> Ted lacked a great deal of impulse control. And I think that's important in these tests I gave. . . . It indicates some central nervous damage or very likely central nervous damage. Combine that and all the other factors of Ted's background, all these other things, we're going to have an individual with some real problems with impulse control.

Id. at 808.

Dr. Wright testified that the combination of Petitioner's childhood history of neglect and abandonment and his neurological dysfunction had impaired Petitioner's judgment and his ability to control his behavior. Id. at 809. According to Dr. Wright, Petitioner learned to cope with reality by living most of his life in "fantasy." Id. at 810. He explained to the jury that Petitioner's early life experiences were so painful that he had erased memories of his childhood. Id. at 807. Dr. Wright summed up his opinion by saying that although Petitioner started life with "fantastic raw material," (*i.e.*, high native intelligence), the abandonment, neglect, and mistreatment Petitioner suffered as a child left his personality "very damaged" and "horribly" distorted. Id. at 812.

Dr. Wright predicted that Petitioner should eventually "burn out" and no longer constitute a threat to society. Id. at 807. In the meantime, however, because of Petitioner's lack of impulse control and the lasting emotional and psychological damage resulting from childhood mistreatment, Dr. Wright admitted that Petitioner would pose a threat until some point in time "years from now." Id. at 813; see also id. at 819 (admitting that Petitioner "absolutely" is more likely than the average person to "do something dangerous or antisocial or violent"), 809 (Petitioner "very often can't behave in another way" than to give rein to his impulses).

At closing argument, defense counsel was unable to articulate any straightforward way for the jury to find that Petitioner's troubled background and impulse control problems supported a "no"

answer to either of the narrowly circumscribed inquiries of the former Texas capital sentencing statute. Defense counsel nevertheless gamely appealed to the jury to consider the intuitive relevance of Petitioner's tumultuous life history in deciding the appropriate punishment:

> And from that point forward, he's had nothing but problems. He would go to live with his father and have problems. He's been rejected everywhere. The only peace he ever finds is in the penitentiary. And that's the only life he's ever known. He doesn't know how – how it is to live out on the street. He hasn't had the opportunity. And I'm not saying we give him the opportunity. I don't want to give him the opportunity. But on the other hand, it's not right to kill him just to show killing is wrong. It's not.
>
> Look at all the evidence again. . . . Think about it, read it, mull it over . . . and decide Ted's fate. But believe it or not, he is a human being . . . . Can we in all good conscience sentence him to death?

RR XVII at 881-883. Nowhere in his brief summation did defense counsel urge that the evidence could support a "no" answer to the "future dangerousness" question. Id. at 879-883.

The prosecutor responded that the jury was not making a choice to impose the death sentence upon Petitioner, but was simply called on to "answer those [special issue] questions correctly." Id. at 886. He vigorously reminded the jurors that they had "promised" during voir dire to answer the special issues "yes" if the State "met its burden of proof." Id. at 883. As the prosecutor summed up his plea:

> Future dangerousness? Yes. Society has a right to protect itself. And the time is now for you to do your duty; and that duty is to admit the State has met its burden of proof in this case and to answer special issue number one "yes," and special issue number two "yes." That's what the evidence points to beyond a reasonable doubt, what you heard on this stand, what you will see – what you see in the paperwork. The time has come to act, and the time is to answer – please, this is a serious thing, and I'm not going to make light of it. It's a time for you to consider it all and make that decision and answer those questions correctly. But the State suggests – strongly urges and points to the evidence – the answer is "yes" to both those special issues.

Id. at 885.

The jury, as the prosecutor understood, was limited to answering whether the murder was "deliberate" and whether Petitioner posed a "continuing threat" to society. It returned affirmative answers to both, mandating a death sentence. *See* Appendix D (pre-1991 Texas capital sentencing statute, requiring trial court to impose death when both questions answered "yes").

C. How The Issue Was Raised And Decided Below

Petitioner objected to the penalty-phase jury charge and proffered five separate instructions to permit the jury to consider his mitigating evidence. CR at 157, 159-163. All were refused. RR XVII at 856-57. The court also denied Petitioner's request that it define "deliberately," the key term in the first special issue. RR XVII at 857; *see also* Penry v. Lynaugh, 492 U.S. 302, 322-23 (1989) ("Penry I") (suggesting that defining "deliberately" might cure the defect in the former Texas scheme as applied to particular evidence). Citing Penry I, Petitioner challenged in state post-conviction proceedings the adequacy of the jury instructions in light of his mitigating evidence. The state court concluded that the generic testimony from Petitioner's experts – indicating that *all* offenders grow less dangerous as they age – provided the jury with an avenue for giving effect to Petitioner's destructive family background, impaired impulse control, and organic neurological dysfunction. It also relied on then-recent Texas and federal caselaw holding that "[such] mitigating evidence [as] alcoholism, drug abuse, bad family background, bipolar disorder, low I.Q., substance abuse, head injury, paranoid personality disorder and child abuse were sufficiently considered under the [pre-1991] special issues." *See* Appendix E (state court findings re: "Pendry [sic] claim").

On federal habeas review, the District Court rejected Petitioner's Penry I claim on two grounds. First, it applied the Fifth Circuit's "screening test" for identifying "constitutionally relevant mitigating evidence" later struck down by this Court in Tennard. Under that test, because Petitioner

could not show that his "criminal act was attributable to" a "uniquely severe permanent handicap with which [he was] burdened through no fault of his own," relief under Penry I was unavailable. Appendix C at 9-18. Even assuming Petitioner's mitigating evidence was constitutionally relevant, the District Court further reasoned, the evidence was beyond the jury's effective reach only if there existed "a reasonable likelihood that the jury would have found itself *foreclosed* from considering [it] in answering the special punishment issues." Id. at 10 (citing Johnson v. Texas, 509 U.S. 350, 368 (1993); emphasis added by District Court; internal quotation marks omitted); *see also* id. at 12 ("The defect identified in Penry was that the jury was prevented from giving *any* mitigating effect to the evidence"). Because under controlling Fifth Circuit precedent Petitioner's evidence "could be considered under either the deliberateness or the future dangerousness issues," the District Court denied relief. Id. at 16.

The court below agreed with the District Court, initially denying Petitioner a COA on this claim because none of Petitioner's mitigating evidence satisfied the Fifth Circuit's rigid "constitutional relevance" test. Cole v. Cockrell, No. 01-10646 (5th Cir. 2003) (unpublished) at 5-6. A few weeks later, this Court granted review in Smith v. Dretke, No. 02-11309, and Tennard v. Dretke, No. 02-10038, both cases involving the Fifth Circuit's application of Penry. In light of those developments, Petitioner moved the Fifth Circuit to reconsider its denial of COA on his Penry I claim. In its eventual opinion disposing of the rest of Petitioner's claims, the court below refused to reconsider the COA denial on his Penry claim. Cole v. Dretke, No. 01-10646 (5th Cir. 2004) (unpublished), Petitioner sought review in this Court, which granted *certiorari*, vacated the Fifth Circuit's judgment, and remanded for reconsideration in light of Tennard.

On remand, the Fifth Circuit endorsed as a reasonable application of Penry I the state courts'

conclusion that the jury was able to express its reasoned moral response to Petitioner's mitigating evidence – which showed that his "very rough childhood" of neglect and abandonment left him with lasting emotional and psychological damage, including impaired impulse control – through its answers to the bare "deliberateness" and "future dangerousness" queries of the pre-1991 Texas sentencing statute. The court below began from the premise that Johnson "confirmed the limited scope of Penry I and II," by imposing the requirement that a defendant seeking relief under Penry show that his jury was altogether foreclosed from giving *any* mitigating effect to his evidence. Cole, 418 F.3d at 505 (defendant must show that his jury "was unable to give any effect" to his evidence).[4] It concluded that "the mitigating evidence of [Petitioner's] destructive family background and organic neurological deficiency falls outside of Penry's holding" because "[t]he record does not suggest that the jury viewed [Petitioner's] mitigating evidence as an aggravating factor only, *i.e.*, because he cannot learn from his mistakes, he will remain a danger in the future." Id. at 505, 506-07.

The Fifth Circuit also emphasized that Petitioner's own experts had testified that all offenders tend to "burn out" and become less violent around age "forty-five" or "fifty," and asserted that the jurors could have reasoned their way from that generic testimony to a "no" answer to the future dangerousness question. Id. at 506-07.[5] The panel did not address the significance of the fact that Petitioner's own experts also testified that Petitioner was presently dangerous and would remain so

[4] The panel did not acknowledge, much less distinguish, this Court's statement in Tennard, 542 U.S. at 288, that a Penry violation might occur even when the jury was able to give some mitigating effect to a defendant's evidence in answering the special issue questions. Nor did it explain how Johnson could "confirm" anything about the scope of Penry II, given that this Court decided Johnson eight years before Penry II.

[5] Petitioner was 31 years old at the time of trial, so this prediction cast him as a "continuing threat" for at least the next 10-15 years in the future.

for "years" to come. *See supra*. Nor did the panel take account of any of the context of the proceedings (*e.g.*, the *voir dire* or closing arguments) in assessing how the jurors would likely have understood their range of discretion in answering the special issues.

Petitioner sought rehearing *en banc*, which was denied over the dissent of Judge Dennis. Cole v. Dretke, 443 F.3d 441 (5th Cir. 2006). He pointed out that "[t]he panel's decision erroneously denigrates the pertinent clearly established Supreme Court jurisprudence of Penry I, McKoy, and Boyde specifically highlighted in Tennard and Smith and perpetuates the misinterpretation of Johnson v. Texas and Graham v. Collins as our circuit precedent." Id. at 443. He challenged what he described as the panel's creation of "another Fifth Circuit gloss upon a Supreme Court decision," *i.e.*, "restricting the principles articulated by Penry" to cases involving mitigating evidence which under the pre-1991 statute had a "purely aggravating" effect. Id. at 442. He added that the panel's expansive interpretation of Johnson would "lead[] to many inexplicable inconsistencies," including the fact that "Justice Kennedy, Johnson's author, [thereafter] silently and fully joined in all subsequent opinions by Justice O'Connor in which she forcefully reaffirmed the view of Lockett, Eddings, and Penry I that the principles set forth therein apply to any relevant evidence or factor that might tend to have a mitigat[ing] effect upon the capital sentencer's decision ..., *e.g.*, Penry II and Tennard."[6] Id. at 450-51.

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[6] Judge Dennis has consistently anticipated this Court's view of the scope of Penry I and Penry II. He foresaw this Court's reversal of Penry's second death sentence in Penry II. *See* Penry v. Johnson, 215 F.3d 504, 514 (5th Cir. 2000) (Dennis, J., dissenting) (arguing for relief because "[t]he jury was not clearly and directly instructed that it could consider and give effect to [Penry's] mitigating evidence ... as a whole and beyond the scope of the special issues by declining to impose the death penalty."). Judge Dennis also dissented twice in Tennard before his view was validated by this Court. Tennard v. Cockrell, 284 F.3d 591, 597 (5th Cir. 2002); Tennard v. Cockrell, 317 F.3d 476 (5th Cir. 2003).

REASONS THE COURT SHOULD GRANT REVIEW

I. THE FIFTH CIRCUIT, THOUGH REPEATEDLY ACKNOWLEDGING THAT ITS OWN DETERMINEDLY NARROW READING OF PENRY CONFLICTS WITH THIS COURT'S EXPLICIT EMBRACE OF A BROADER VIEW IN PENRY II AND SMITH V. TEXAS, 543 U.S. 37 (2004), HAS REFUSED TO YIELD TO THE LETTER OR THE SPIRIT OF THIS COURT'S DECISIONS.

Since 2001, this Court has issued three decisions addressing as-applied challenges to the pre-1991 Texas capital sentencing statute: Penry v. Johnson, 532 U.S. 782, 797 (2001) ("Penry II"), Tennard, and Smith v. Texas, 543 U.S. 37 (2004) (*per curiam*). Taken together, these three decisions provide detailed doctrinal and practical guidance regarding the Eighth Amendment guarantee of individualized sentencing in the context of that statute. First, the Court twice described the test to be applied: a capital sentencing jury's instructions are "constitutionally inadequate" unless they "allow the jury to give *full* consideration and *full* effect to mitigating circumstances in choosing the defendant's appropriate sentence." Smith, 543 U.S. at 38 (emphasis in original) (citing Penry II, 532 U.S. at 797).[7] Second, the Court modeled the application of that test in a case involving a nineteen-year-old defendant with potentially organic learning disabilities and speech handicaps, an IQ of 78 and a history of special education classes, "exemplary" behavior in school despite the low IQ and learning disabilities, and a drug-addicted father who was involved with gang violence and stole from the family to buy drugs. *See* Smith, 543 U.S. at 41. As this Court explained, the bare "deliberateness" and "future dangerousness" questions of the former Texas statute were inadequate

[7] Between Penry II and Smith, this Court decided Tennard; although the "*full* effect" language does not appear in the majority opinion in Tennard, the late Chief Justice Rehnquist's *dissenting* opinion in Tennard is premised on the theory that permitting jurors to give "some effect" to mitigating evidence would satisfy the Eighth Amendment. *See Tennard*, 542 U.S. at 290-92 (Rehnquist, C.J., dissenting). Tennard thus stands firmly in line with Penry II and Smith in rejecting anything less

to permit the jury to give "*full* effect" to such mitigating evidence because the jury's consideration of that evidence was "tied to findings of deliberateness and future dangerousness that had had little, if anything, to do with the mitigation evidence petitioner presented." Id. at 48. Smith thus provided a sensible analysis for determining when the former Texas statute required supplemental instructions to satisfy Penry I. This Court issued its opinion in Smith in November, 2004.

Since then, however, the Fifth Circuit has consistently and repeatedly challenged whether this Court meant what it straightforwardly said in Smith. In its very first opinion citing Smith, written only a few weeks after that opinion was handed down, the Fifth Circuit implicitly acknowledged the likelihood that its own caselaw narrowly interpreting Penry I did not survive Smith – but turned the tables by suggesting that it was up to *this Court* to make yet another statement of its intent to adopt a broad reading of Penry I:

> Any reading of Smith as not being limited to mental impairment but rather reaching all types of mitigating evidence ... is inconsistent with [Jurek v. Texas, 428 U.S. 262 (1976); Graham v. Collins, 506 U.S 461 (1993); and Johnson v. Texas, 509 U.S. 350 (1993)]. We are not persuaded that the Court intended to undercut Jurek, Graham, and Johnson without even citing them. Whether Tennard or Smith sweep so broadly as to create a conflict with its own Jurek or Graham decisions is for the Supreme Court.

In re Kunkle, 398 F.3d 683, 685 (5th Cir. 2005). Contrary to this reasoning, this Court's decision in Smith could not fairly be read as "limited to [mitigating evidence of] mental impairment" or as preserving prior Fifth Circuit doctrine restricting the scope of Penry. First, in reversing Smith's death sentence, this Court made no suggestion that Smith's mental impairment was uniquely relevant to the outcome. Second, this Court referred to the totality of Smith's mitigating evidence when it declared that the inquiries of the special issues had "little, if anything, to do with" his evidence.

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than "*full* consideration and *full* effect."

Smith, 543 U.S. at 48. Finally, this Court did not fail to cite Johnson in clarifying its limited reach; instead, both Penry II and Smith invoke the "*full* consideration and *full* effect" standard set forth in Justice O'Connor's **dissenting** opinion in Johnson.

A few months later, the Fifth Circuit more openly acknowledged its ongoing struggle to reconcile its own narrow reading of Penry I with the evident import of Penry II and Smith. In R.G. Smith v. Dretke, 422 F.3d 269 (5th Cir. 2005), the court below weighed whether to grant a COA on a Penry claim premised on mitigating evidence of "an impoverished background, growing up in a crime-infested environment and alcohol abuse," given "this Circuit's prior jurisprudence [holding that such evidence] can all be given effect through both the deliberateness and future dangerousness special issue questions." R.G. Smith, 422 F.3d at 285-86. Even as it reluctantly granted COA, the Fifth Circuit warned that Kunkle was "another hurdle" to relief on the merits (*i.e.*, "another hurdle" in addition to the Fifth Circuit's own pre-Smith caselaw), pointing out that Kunkle's reasoning would require evidence of mental impairment. Id. at 287. At the same time, however, the R.G. Smith panel conceded that this limitation was "the exact opposite" of what this Court said in Smith:

> We note that the Supreme Court has never explicitly stated that Penry claims cannot be extended beyond claims involving evidence of "mental impairment." In fact at times, it seems the Court has said the exact opposite. For example, in Smith v. Texas, the defendant put forward evidence of (1) organic learning disabilities and speech handicaps; (2) verbal IQ score of 75 and a full IQ score of 78; (3) his exemplary behavior at school despite his learning disabilities; (4) the involvement of his father with drugs and gang violence; and (5) Smith's young age of nineteen at the time he committed the crime. In granting his Penry claim, the Supreme Court did not in any way highlight any particular piece of Smith's evidence. The only mention the Smith Court made of whether the defendant's evidence was outside the reach of the special issue questions was the Court's single sentence that "[j]ust as in Penry II, petitioner's jury was required by law to answer a verdict form that made no mention whatsoever of mitigation evidence. And just as in Penry II, the burden of proof on the State was tied by law to findings of deliberateness and future dangerousness that had little, if anything, to do with the mitigation evidence petitioner presented."

Id. at 287 n.8 (citation omitted). Having acknowledged the tension between the Fifth Circuit's own decisions and this Court's, however, the R.G. Smith panel went no further towards resolving it.

In a third decision, handed down on March 1 of this year, the Fifth Circuit again conceded that "tension" exists between the "some effect" standard consistently applied in its own decisions and the emphatic "*full* consideration and *full* effect" standard declared by Penry II and Smith. This Court had remanded Tennard v. Dretke after concluding that the Fifth Circuit erred in relying on its baseless "constitutional relevance" doctrine to deny COA on Tennard's Penry I claim. On remand, the Fifth Circuit first traced the history of this Court's treatment of challenges to the former Texas capital sentencing scheme. *See* Tennard v. Dretke, 442 F.3d 240, 246-252 (5th Cir. 2006). It then acknowledged that this Court's unmistakably clear language in Smith is "in tension with ... Graham and Johnson:"

> In Smith v. Texas, the Court indicated that capital sentencing procedures are constitutionally infirm whenever they do 'not allow the jury to give "*full* consideration and *full* effect to mitigating circumstances" in choosing the defendant's appropriate sentence.' ... This language, which originated in Justice O'Connor's Johnson v. Texas dissent, may be in tension with Jurek and its progeny, particularly Graham and Johnson.

Id. at 253 n.17 (citations omitted). As it had in R.G. Smith, however, the Fifth Circuit in Tennard discounted the need to resolve that tension, breezily announcing that it would "leave it to other[s] to tidy the High Court's Augean stables." Id.

It is plain that Kunkle's bold challenge to this Court's decision in Smith, though technically *dicta*[8], presaged what has become the Fifth Circuit's refusal to embrace the reading of Penry

[8] Kunkle involved a successive application for federal habeas relief. Thus, the key question for the Fifth Circuit was whether Tennard and/or Smith announced a "previously unavailable" rule of law

articulated in Smith. The Fifth Circuit now essentially acknowledges that to the extent this Court demands that jury instructions permit *all* mitigating evidence to be given "*full* consideration and *full* effect," in the plain language of Penry II and Smith, such a requirement represents "the exact opposite" of the Fifth Circuit's own view, which insists on the primacy of Johnson and endorses instructions so long as they do not altogether *prevent* evidence from being taken into account, however tangentially. In no case, however, has the Fifth Circuit confronted the implications of the fact that both Penry II and Smith cite Justice O'Connor's dissenting opinion in Johnson as stating the standard for assessing whether jury instructions permit robust individualized consideration of a defendant's proffered mitigating circumstances.

Moreover, the Texas Court of Criminal Appeals ("CCA"), has stated that it, too, is "uncertain as to the Supreme Court's current Penry II jurisprudence." *Ex parte* Smith, 185 S.W.3d 455 (Tex. Crim. App. 2006) (denying Penry relief on remand from this Court). The CCA recognizes that "numerous post-Smith, post-Tennard Fifth Circuit cases have held that mitigating evidence [like that at issue in Smith] is fully encompassed by the Texas 'future dangerousness' or 'deliberation' special issues." Id. at 466 and n.35. This Court should grant review in Petitioner's case to conclusively resolve the "uncertainty" that troubles the CCA, as well as the "tension" the Fifth Circuit concedes to exist between its cases and this Court's most recent opinions interpreting Penry.

Despite the clarity of the guidance this Court has previously provided the Fifth Circuit and the Texas courts on comparable questions, this Court's intervention is once again necessary to

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retroactively applicable on collateral review. *See* 28 U.S.C. § 2244(b)(2). The court answered this question in the negative. Kunkle, 398 F.3d at 684-85. It proceeded to discuss the merits of Kunkle's Penry I claim in an alternative holding, where it expressed the view that a literal reading of Smith would collide with Jurek, Graham, and Johnson.

resolve once and for all the enduring confusion in the courts below regarding the scope of Penry. The Fifth Circuit, while acknowledging that "tension" exists between its own decisions and those of this Court, refuses to abandon its own pre-Penry II, pre-Smith caselaw. Absent correction, the Fifth Circuit will evidently continue to maintain that jurors limited to answering whether a killing was "deliberate" and whether the defendant might be dangerous in the future could somehow express in those answers their reasoned moral response to mitigating evidence like Petitioner's history of a destructive family background, the severe emotional and psychological scars he suffered as a result, and his neurological dysfunction and impaired impulse control. That reasoning is squarely irreconcilable with Smith, and this Court should grant review and say so.

A. IN A STRING OF RECENT DECISIONS INCLUDING PETITIONER'S CASE, THE FIFTH CIRCUIT HAS REFUSED TO ACKNOWLEDGE OR FOLLOW THIS COURT'S PRONOUNCEMENT IN SMITH THAT EVIDENCE OF CHILDHOOD DEPRIVATION AND ABUSE, LIKE THAT PRESENTED BY PETITIONER, "HAS LITTLE, IF ANYTHING, TO DO WITH" THE FORMER TEXAS SPECIAL ISSUES AND THUS REQUIRES ADDITIONAL INSTRUCTIONS BEYOND THOSE NARROW INQUIRIES.

As noted, Petitioner presented extensive evidence that he was neglected, abandoned, and mistreated as a child, including evidence that one parent was an alcoholic and the other a criminal. *Cf.* Smith, 543 U.S. at 41 (describing mitigating evidence that defendant's father was addicted to drugs and involved in criminal violence). It is well-settled that this evidence could reasonably serve as the basis for a life sentence. *See, e.g.*, Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) (defendant's "turbulent family history" was "relevant mitigating evidence"). More important, this Court confirmed in Smith that such evidence about the deprived circumstances of a defendant's background "*has little, if anything, to do with*" the deliberateness of the crime *or* the likelihood that

the defendant poses a "continuing threat to society." Smith, 543 U.S. at 48 (emphasis added). For that reason, its mitigating value falls "beyond the scope" of those questions, requiring additional instructions to place the evidence fully within the jury's reach. *See* Penry I, 492 U.S. at 321-22.

Not only do the relevant mitigating qualities of such evidence "have little ... to do with" the probability that the defendant will be dangerous in the future, but evidence of a defendant's deprived background generally bears an *aggravating* relationship to his prospects for non-violent behavior in the future. Common sense teaches that an adult who spent his childhood in such a destructive environment may well lack the self-control and judgment to avoid acting out violently. *See* Penry I, 492 U.S. at 323. As a result, in the eyes of jurors shackled to the future dangerousness question, "child abuse serves as an aggravating, rather than mitigating, factor." Robertson v. Cockrell, 325 F.3d 243, 278 (5th Cir. 2003) (*en banc*) (Dennis, J., dissenting) (footnote omitted). In his dissent, Judge Dennis observed that:

> ... Chief Justice Rehnquist noted in a different context in Santosky v. Kramer, 455 U.S. 745, 789 (1982) (Rehnquist, J., dissenting), "[i]t requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens." Given such common knowledge of the greater likelihood of recidivism among abused children, the Texas special issues leaves a jury with no room to register its conclusion that while a defendant is a future threat to society, his abuse as a child reduces his responsibility for that threat, making use of the death penalty inappropriate.

Id.

Prior to this Court's decisions in Tennard and Smith, the Fifth Circuit generally denied Penry claims premised on evidence of a troubled childhood background by applying its "constitutional relevance" screening test, which such evidence invariably failed – either because it was regarded as insufficiently "severe," or because it had no explicit causal "nexus" with the crime. On those

occasions when the Fifth Circuit addressed the capacity of the pre-1991 special issues to afford such evidence meaningful consideration as mitigating, it simply asserted, without explanation, that evidence of such trauma could be considered *as mitigating* under the "future dangerousness" question. *See, e.g.*, Robertson, 325 F.3d at 253 (finding that "the statutory special issues were adequate to allow the jury to effectuate the mitigating potential of" the defendant's evidence that he was beaten by his father); *see also* id. at 249-250 n.7 (citing numerous cases where "childhood abuse was proffered as mitigating evidence" and the Fifth Circuit denied Penry relief).

Even after Penry I, in which this Court found that evidence of childhood abuse could not be given mitigating consideration within the scope of the pre-1991 special issues, the Fifth Circuit's argument that evidence of childhood trauma could support a "no" answer to the future dangerousness question was logically indefensible. But after Smith, in which this Court found the pre-1991 special issues constitutionally deficient as applied *specifically* to evidence of a deprived childhood background, and explicitly held that the mitigating qualities of such evidence were *not relevant* to either the "deliberateness" or "future dangerousness" issues, it is remarkable that the Fifth Circuit continues steadfastly to maintain, in effect, that this Court must have been mistaken.

First, of course, the Fifth Circuit found in Petitioner's own case that because his background of abandonment, neglect, and deprivation "did not suggest that he was unable to learn from his mistakes," it was not likely to have been viewed by the jury "as an aggravating factor *only*," and thus that Penry was not implicated. Cole, 418 F.3d at 506-07 (emphasis added). It further noted that some of the testimony of Petitioner's experts "suggested ... that [Petitioner] could change in the future," evidence which it found "fits well within the broad scope of the future dangerousness special issue." Id. at 507. For those reasons, the court below concluded that Petitioner's evidence of

childhood trauma "falls within the scope of the special issues," holding that "the jury could have considered [Petitioner's] family background ... under – at the least – the future dangerousness special issue." Id.

Petitioner's case is no isolated anomaly. Since Tennard and Smith, the Fifth Circuit has repeatedly considered Penry claims involving comparable evidence of a traumatic or deprived background. Each time, it has concluded that, notwithstanding Smith, the jury could give such evidence full mitigating effect in deciding whether the defendant posed a "future danger" – and it has consistently cited the logic of its own pre-Smith opinions in support of that holding. *See, e.g.*, Newton v. Dretke, 371 F.3d 250, 256-57 (5th Cir. 2004) (evidence of defendant's difficult background was within the scope of the pre-1991 special issues) (citing James v. Collins, 987 F.2d 1116, 1121-22 (5th Cir. 1993) (evidence of, *inter alia*, "impoverished and abusive family history" could be adequately considered by jury under special issues)); Brewer v. Dretke, 442 F.3d 273, 280 (5th Cir. 2006) ("[E]vidence of a troubled childhood may, as a result of its temporary character, fall sufficiently within the ambit of the [future] dangerousness instruction"); id. at 280-81 (finding Jacobs v. Scott, 31 F.3d 1319, 1327 (5th Cir. 1994) to be "sufficient authority for our determination that the special issues [are] capable of giving Brewer's evidence of a troubled childhood constitutionally mitigating effect"); *see also* id. at 279 n. 16 (same)); Coble v. Dretke, 444 F.3d 345, 362-63 (5th Cir. 2006) (citing Jacobs to "reject [the] contention that the Texas special issues did not provide an adequate vehicle for the jury to make a reasoned moral response to Coble's mitigating evidence of his troubled childhood"). Indeed, the Fifth Circuit now regards this conclusion as so self-evident that it no longer requires *any* citation to authority. *See, e.g.*, Draughon v. Dretke, 427 F.3d 286, 297-98 (5th Cir. 2005) (in response to defendant's "claim that the jury could not give effect to his evidence of

abuse as a child and 'dysfunctional upbringing' in violation of Penry," stating only that "under controlling precedent [the claim] is lacking in merit. The jury could have given [the evidence] effect under the future dangerousness special issue.").

Leaving aside the fact that this reasoning is irreconcilable with the facts and the outcome of Smith, the Fifth Circuit's analysis fails to enforce a "fair reading" of Penry I as required by Johnson itself, the case upon which the court below purports to base its narrow interpretation of Penry I. Johnson emphasizes that the jury must have a "meaningful basis to consider the relevant mitigating qualities" of the defendant's evidence. 509 U.S. at 369. Because the "signature qualities of youth are transient," the future dangerousness question presented a "meaningful basis" for the jury to consider the fact of Johnson's youth. 509 U.S. at 368-69. Johnson does not imply, much less hold, that evidence of childhood deprivation like Petitioner's would fall outside Penry I's ambit. Instead, the evident implication of Johnson is that in Penry I the "relevant mitigating qualities" of Penry's evidence of childhood trauma (and thus of Petitioner's deprived background) found no reliable expression in the jury's answers to the special issues.

In short, the relevant mitigating quality of Petitioner's childhood abandonment and mistreatment is *not* that there exists some remote possibility that the destructive psychological and emotional consequences of those life experiences may eventually abate. Instead, the relevant mitigating dimension of Petitioner's traumatic background is that, by virtue of its influence on his behavior and judgment at the time of the crime, it significantly diminishes his moral culpability. That jurors must be afforded an adequate vehicle for responding to *this* aspect of a defendant's mitigating evidence is precisely what it means to insist on instructions that permit the jury to give "*full* consideration and *full* effect" to such evidence "in choosing [the] appropriate sentence." Smith,

543 U.S. at 38. The Fifth Circuit's treatment of Penry claims based on childhood deprivation and trauma is hopelessly in conflict with Smith.

The tension between the Fifth Circuit's begrudging view of the mitigating significance of childhood mistreatment and this Court's contrary view is further exacerbated by Williams v. Taylor, 529 U.S. 362 (2000). In addressing whether Williams suffered prejudice from his counsel's failure to develop evidence of his abused background, this Court conceded that such evidence "may not have overcome a finding of future dangerousness." 529 U.S. at 398. But the Court nonetheless found prejudice because a "description of Williams' childhood, filled with abuse and privation" could "well have influenced the jury's appraisal of his moral culpability." This conclusion necessarily entails the conclusion that evidence of childhood deprivation possesses mitigating significance *independent of its relationship to the defendant's likely future dangerousness.* Hence, jurors limited exclusively to assessing dangerousness cannot give "*full* consideration and *full* effect" to such evidence.

One final puzzling aspect of the Fifth Circuit's attempt to distinguish Smith is its confusion regarding the relationship between Penry I and Penry II. Although the court below initially conceded that Smith necessarily stands for the proposition that "the [former] special issues were not broad enough to encompass Smith's [mitigating] evidence," 418 F.3d at 504, everywhere else the Cole opinion treats Smith as having turned on the presence in that case of a "nullification instruction," which Petitioner's jury did not receive. Indeed, before even turning to what relationship Petitioner's mitigating evidence might have borne to the former special issues, the court below first detailed the history of "nullification instructions" in pre-1991 Texas cases. *See* Cole, 418 F.3d at 503-05. The panel then clearly indicated that it felt this history had some relevance to *Petitioner*'s Penry I claim,

saying, "With this [lengthy discussion of nullification instructions] in mind, we address Cole's claim...." Id. at 505. The opinion later returns to the question of "nullification instructions" to suggest that the outcome in Smith turned on the fact that his "jurors were faced with having to voice a false answer to a special issue ... to avoid the death penalty," while the trial court in Petitioner's case "did not deliver conflicting instructions [placing] the jurors in [such] an ethical dilemma." Id. at 508, 510.

This analysis is flawed for two reasons. First, Smith on its own terms provided a Penry I holding – that additional instructions were necessary because Smith's mitigating evidence "had little, if anything, to do with" the special issues. Smith, 543 U.S. at 48. Second, even under the Fifth Circuit's own precedent, it is settled that the presence of a "nullification instruction" does not require relief unless the defendant's mitigating evidence had relevance outside the pre-1991 special issues. *See, e.g.*, Coble, *supra*. Because this Court in Smith clearly engaged in a Penry I analysis and found the former special issues wanting as applied to Smith's evidence, the Fifth Circuit is obliged to treat Smith as a controlling precedent on Penry I, and give it a fair reading. This Court should grant *certiorari* to so hold.

B. THE FIFTH CIRCUIT'S POST-SMITH PRACTICE OF REFLEXIVELY CHARACTERIZING MENTAL DISORDERS LIKE PETITIONER'S AS "NON-PERMANENT" – AND THUS ALLEGEDLY MITIGATING UNDER THE "FUTURE DANGEROUSNESS" INQUIRY – SIMPLY RESURRECTS AS A *PER SE* BAR TO PENRY RELIEF THE "SEVERITY" SCREENING TEST THIS COURT EXPLICITLY REJECTED IN TENNARD.

Petitioner, like Penry, presented expert testimony that he suffers from a mental disorder that impairs his impulse control. In Petitioner's case, that disorder is neurological dysfunction, demonstrated by his extremely poor performance on a battery of tests tailored to detect such

impairment. RR XVII at 802-05. As the defense expert informed the jury, Petitioner's test results indicate "very likely central nervous [system] damage," which combined with "all the other factors of [his] background," produces "an individual with some real problems with impulse control." Id. at 808. Dr. Wright was forced to concede that because of the combination of Petitioner's background and his neurological impairment, Petitioner would likely pose a threat of future violence until "years from now." Id. at 813.

The Fifth Circuit found that Petitioner's evidence of mental disorder was within the jury's "effective reach" under the "future dangerousness" question, reasoning as follows. First, it emphasized that Petitioner's own experts had testified that – "not now, but later in life" – "individuals who have had this kind of background ... change. They burn out." Cole, 418 F.3d at 505-06. Second, it found that a juror who credited this part of the experts' testimony would have been able to honestly answer "no" to the future dangerousness question. Id. at 507-08 ("Specifically, the jury could have considered Cole's ... organic deficiency evidence under – at the least – the future dangerousness special issue. Given the experts' testimony during the punishment phase, the jury could have believed them and found that, although Cole ... may suffer from diminished impulse control, he is capable of change and thus would not necessarily remain a danger in the future").

The Fifth Circuit has offered the same rationale – identifying a defendant's mental disorder as "non-permanent," and then asserting that *any* non-permanent condition can by definition be given mitigating effect under the "future dangerousness" question – repeatedly in the wake of Smith. For example, the defendant in Coble, *supra*, presented expert testimony that he suffered from "two psychiatric disorders: post-traumatic stress disorder, brought about by his Vietnam experiences, and a bipolar disorder." Coble, 444 F.3d at 359. Like Petitioner's own experts, Coble's experts

conceded that his mental disorders "would make him a continuing threat." Id. However, some testimony also indicated that Coble "would be less likely to be violent if he took medication." Id. at 360. Citing its own pre-Smith cases, the Fifth Circuit concluded based on that testimony that "Coble's mitigating evidence demonstrated that his mental illness was treatable, thus placing it within the effective reach of the sentencer" under the "future dangerousness" question, as "[t]his Circuit has previously held." Id. at 361 (citing Lucas v. Johnson, 132F.3d 1069, 1082-83 (5th Cir. 1998); and Robison v.Johnson, 151 F.3d 256, 266 (5th Cir. 1998)).

The Fifth Circuit applied the same *per se* rule, prohibiting Penry relief to any claimant suffering from an arguably "non-permanent" mental disorder, in Brewer, *supra*. Brewer had suffered "a bout with depression three months before the murder [for which he] was briefly hospitalized," and had been "dominated and manipulated" by a woman with whom he was "obsessed." Brewer, 442 F.3d at 279. The Fifth Circuit began its analysis with the announcement that Smith's demand that instructions permit jurors to give "*full* consideration and *full* effect" to mitigating evidence was simply a matter of "semantics," because "[e]ven if the requirement is called 'full,' it means nothing more than 'sufficient.'" Id. at 278-79. Then, it trivialized the significance of Brewer's evidence of mental disorder, which it criticized as "not based on an especially strong factual predicate," since Brewer was "not adjudged mentally retarded" and had suffered only a "single episode" of clinical depression "without psychotic features." Id. at 275 n.1; *see also* id. at 279 (Brewer's evidence reflected only "a single episode of non-psychotic major depression"). It then applied its *per se* rule in the following terms: "This circuit has made a distinction between mental retardation and mental illness. [M]ental illness ... does not require any adjustment to the standard two-pronged interrogatory, and we have rejected habeas petitions on these grounds on other occasions. The only

instances in which mental illness has given rise to Penry I violations involve those where the illness in question is chronic and/or immutable." Id. at 280 (footnotes omitted). Since Brewer's mental disorder was non-permanent, Penry relief was *ipso facto* unavailable. Id. As in Coble, the Fifth Circuit supported this conclusion with citations to its pre-Smith opinions in Lucas and Robison. Id. at n.17 & n.18.

These cases well illustrate the Fifth Circuit's continuing practice, even post-Smith, of treating any "non-permanent" mental disorder as *per se* unproblematic under Penry I. That inflexible rule effectively resurrects the threshold screening test this Court rejected out of hand in Tennard. Where, prior to Tennard, the Fifth Circuit reflexively dismissed any non-permanent condition by holding, "Any non-permanent condition is by definition not 'constitutionally relevant mitigating evidence,'" it now reflexively dismisses the same evidence by holding, "Any non-permanent condition can support a 'no' answer to the 'future dangerousness question, so no additional instructions are necessary." This *per se* rule is nothing more than the now-discredited "uniquely severe permanent handicap" standard by another name. Tennard makes clear that a court reviewing for Penry I error should not assess the "permanence" or "severity" of the condition the defendant asserts as mitigating, but instead ask whether the jury could have expressed its reasoned moral response to the relevant mitigating qualities of that evidence in answering the special issues. Tennard, 542 U.S. at 287-89.[9]

The Fifth Circuit's analysis fails profoundly to appreciate what is actually *mitigating* about a

[9] None of the evidence at trial indicated that Petitioner's *neurological dysfunction*, as opposed to the *destructive impact of the mistreatment he suffered as a child*, was "non-permanent." The testimony the Fifth Circuit asserted would support such a characterization referred specifically to "individuals who have had this kind of *background*," and said nothing whatsoever about Petitioner's *central nervous system damage*. Contrary to the Fifth Circuit's claim, that condition, like the disabilities addressed in Penry, Tennard, and Smith, is permanent.

defendant's underlying mental disorder – *i.e.*, its effect on the defendant's moral culpability for the crime. *That* aspect of the underlying mental disorder is not captured in any way by the fact that there may exist some remote possibility that the disorder, as the years pass, may become less severe, or interfere less with the defendant's functioning in the world. Nor is it captured by testimony like that of Petitioner's experts, who offered only the unremarkable observation that individuals generally become less likely to be violent as they age, and that one might hope Petitioner would follow the same arc. *See, e.g.*, RR XVII at 813 (Dr. Wright's testimony that "research indicates that ... individuals who commit violent [acts]" change as they grow older, in part because "the process of aging takes over, *as it does in all of us*") (emphasis added). The court below treated this testimony as placing the evidence about Petitioner's impaired impulse control and his organic neurological deficits within the jurors' reach under the future dangerousness question.

But the mitigating inference that arises from such testimony is true for *any* offender; it is a *generic* argument that speaks to the likelihood that most offenders become less dangerous as they grow older. It is no less true of defendants who come from loving and supportive backgrounds and who lack any psychological, emotional, or neurological impairment than it is of a defendant like Petitioner, shaped by a background of neglect and mistreatment and burdened by neurologically impaired impulse control. In short, while the "future dangerousness" question may have been an adequate vehicle for the jury to give mitigating effect to generic evidence indicating that *all* defendants generally grow less violent as they age, it gave the jury *no* vehicle for expressing the conclusion that the unique constellation of mitigating circumstances present in Petitioner's background reduced his moral culpability for the crime so as to call for a life sentence.

Simply put, some of the trial testimony indicated Petitioner might grow less dangerous with

the passage of the years *for reasons unrelated to his mitigating circumstances* – for reasons that would apply, in Dr. Wright's words, to "all of us." The Fifth Circuit's view that this testimony somehow presented the jury with an adequate vehicle for giving full effect to the relevant mitigating qualities of the circumstances of Cole's background *as such* is erroneous, as is its broader view that allowing jurors to consider and give effect to the "non-permanent" nature of a mental disorder is an acceptable substitute for allowing them to consider and give effect to its actual consequences for an offender's moral culpability. While the transience or amenability to treatment of a particular mental disorder might make it *less aggravating* under the future dangerousness question, this Court's cases demand that the jury be provided a vehicle for considering such evidence *as mitigating* – not simply as "potentially somewhat less aggravating." This Court should grant *certiorari* to consider whether the Fifth Circuit's imposition of a strict "permanence" requirement for Penry relief can be sustained in light of Tennard and Smith.

C. THE FIFTH CIRCUIT'S PENRY ANALYSIS FAILED TO GIVE DUE REGARD TO THE FACT THAT HERE, AS IN MANY CASES TRIED UNDER THE PRE-1991 SENTENCING STATUTE, PROSECUTORS REPEATEDLY SOUGHT TO EXPLOIT THE NARROW SCOPE OF THE FORMER SPECIAL ISSUES AND REMIND JURORS THAT THEY WERE DUTY-BOUND TO ANSWER THOSE ISSUES ON THEIR OWN TERMS AND NOT TO ACHIEVE A JUST RESULT IN LIGHT OF PETITIONER'S MITIGATING EVIDENCE.

This Court has acknowledged that the context of the proceedings is relevant in determining whether a jury could reasonably have given effect to the defendant's mitigating evidence under its instructions. Boyde v. California, 494 U.S. 370, 383 (1990); Penry, 532 U.S. at 800-02, ("[W]e will approach jury instructions in the same way a jury would – with a commonsense understanding of the instructions in the light of all that has taken place at trial.") (internal quotations omitted). Another

vice of the Fifth Circuit's post-Smith treatment of Penry claims is that the court never examines either the arguments of counsel or the information provided to jurors during *voir dire* as a source for illuminating how the jurors may have understood the pre-1991 special issues to limit their sentencing discretion. The record of Petitioner's case is representative in this regard; both at *voir dire* and at closing argument, the prosecutors took advantage of the textual narrowness of the special issues and the jurors' oath to answer them according to the evidence – yet the Fifth Circuit failed to acknowledge, much less engage, those important facts in determining whether Penry was violated.

During *voir dire*, the prosecuting attorney repeatedly made statements blurring the distinction between "intentional," the *mens rea* for conviction of capital murder as charged in Petitioner's case, and "deliberate," the key term in the former first special issue. He acknowledged with most jurors that in common understanding there was little difference between "intentionally," as that term would be defined at the guilt phase, and "deliberately," which would not be defined. *See, e.g.*, RR VII at 909-910 (juror Thornesbery) (prosecutor concedes that "outside of the courtroom," intentional and deliberate "may mean the same thing," and that treating the terms as different is "a little bit like splitting hairs"); 911-12 (juror Thornesbery, asked to explain the difference between the two terms, confesses that he "do[es]n't know how"); RR IX at 1285 (juror Vogt) (prosecutor admits he "would be surprised if [the juror] said anything different than that they're pretty similar"); 1308-09 (it would be "virtually impossible" for juror not to answer the first special issue "yes" if the jury had already found the defendant guilty of capital murder); RR XI at 1481-82 (juror Golden) (prosecutor "would be surprised if [the juror] said [deliberately] meant that much different [from intentionally];" RR XII at 1743 (juror Engdahl) (it would be "hard" for juror not to "automatically and reflexively" find that the defendant acted deliberately if the jury had already convicted him of an intentional killing). In

light of those exchanges, it is impossible to conclud hat the jurors, once they had found that Petitioner "intentionally" killed Raymond Richardson, were able to give meaningful effect to Petitioner's mitigating evidence in determining whether he had also committed the murder "deliberately." *Cf.* Penry, 492 U.S. at 323 (absent definitions clearly distinguishing "deliberately" and "intentionally," court can have no confidence that jurors' "yes" answer to the first special issue represented a reasoned moral response that death was the appropriate sentence).

The court below also failed to acknowledge that the inadequacy of the pre-1991 special issues as applied to Petitioner's mitigating evidence was apparent from the closing arguments at punishment. From the Fifth Circuit's holding – that jurors doubtless understood that Petitioner's deprived background and mental disorder, in light of the testimony of his experts, supported a "no" answer to the "future dangerousness" question – one would expect to see *some* version of that argument offered by defense counsel. But Petitioner's trial counsel never argued that Petitioner's mitigating evidence logically supported a negative answer to the "future dangerousness" question. *See generally* RR XVII at 879-883. Instead, counsel effectively urged nullification, telling the jury that "[t]he right thing to do ... is to answer those special issues in such a manner that he be sent to prison for life." Id. at 881. It is unlikely, to say the least, that the jurors would have thought they could express a "reasoned moral response" to Petitioner's impairments by answering the "future dangerousness" question "no" where defense counsel never suggested any way they could do so without violating their oath to answer the questions honestly according to the evidence.[10]

[10] Indeed, in much the same vein, Penry's defense counsel initially urged the jury to answer the first special issue "no" because "it would be the just answer, and [a] proper answer." Penry I, 492 U.S. at 325. Ultimately, however, Penry's counsel, like Petitioner's, was reduced to arguing that it simply would be wrong to sentence someone to death who labored under such a disability.

Nor did the Fifth Circuit, in rejecting Petitioner's Penry claim, attend to the prosecutor's arguments. Here, just as in Penry I and Smith, the prosecutor responded to defense counsel's attempt to plead for nullification by demanding that jurors honor their oath to answer the special issues honestly according to the evidence. RR XVII at 886 (prosecutor argues that jury is not choosing to impose a death sentence, but is simply called on to "answer those [special issue] questions correctly"). He reminded jurors that they had "promised" during *voir dire* to answer the special issues "yes" if the State "met its burden of proof." Id. at 883. *Cf.* Penry I, 492 U.S. at 325 ("You've all taken an oath to follow the law and you know what the law is.... [Y]our job as jurors and your duty as jurors is not to act on your emotions, but to act [on] the evidence that you have heard in this courtroom, then answer those questions accordingly"); Smith, 543 U.S. at 48 n.5 (prosecutor argued that jurors "had promised to 'follow the law' and return a 'yes' answer to the special issues as long as the State met its burden of proof").

This Court emphatically has made clear that "nullification" is not an appropriate strategy for accommodating the Eighth Amendment requirement of individualized sentencing, even when the jury charge explicitly authorizes that response. Penry II, 532 U.S. at 790; Smith, 543 U.S. at 45-48. If anything, the unadorned pre-1991 special issues afforded Petitioner – whose counsel could only plead with jurors to "do the right thing" by answering the special issues "in such a manner that he be sent to prison for life" – even less protection than the defendants in those cases. Absent instructions to consider Petitioner's background as it bore on his moral culpability, the jurors were bound by their oaths – as the prosecutor urged – to return an affirmative answer to the second special issue.

The prosecutor's comments to several jurors during *voir dire* strengthen this inference about the preclusive effect of the special issues. For example, he elicited from juror Beeson her promise

not to "substitute [her] opinion" about the appropriate punishment for Petitioner "for what the legislature has provided," *i.e.*, the answers to the special issues, because the legislature has chosen to limit "the scope of [her] consideration" to those inquiries alone. RR XI at 1566-67; *see also* RR XI at 1577 (juror Beeson instructed by prosecutor that she may not "find against the evidence" in answering the special issues "just because of the way you felt about the parties or about the crime." The prosecutor made clear to juror Beeson that she must put her views about the appropriate punishment "out of [her] mind:"

> If a person had a bad upbringing, but looking at those special issues, you felt that they met the standards regarding deliberateness and being a continuing threat to society, could you still vote "yes," even though you felt like maybe they'd had a rough time as a kid? If you felt that the facts brought to you by the prosecution warranted a "yes" answer, could you *put that out of your mind and just go by the facts*?

RR XI at 1588 (emphasis added). Similarly, the prosecutor explained to juror Rocap that the jury "in Texas does not say life or death," but must "answer[] those questions ... to the best of their ability under their oath to judge the question and give the answer based on the evidence, regardless of what their personal preference might be as [to] what they'd like to see happen in the case." RR XIII at 1900. He elicited juror Rocap's promise "not [to] skew the answer [to the special issue questions] to produce the desired result contrary to the evidence." Id. at 1917.

In sum, the context of the proceedings as a whole, including *voir dire* and closing arguments as well as the evidence presented and the sentencing instructions and verdict form, argue for relief under Penry I. The prosecutor understandably sought to exploit the narrow inquiry of the special issues, and defense counsel begged for jury nullification in response. The Fifth Circuit, in improvising *post hoc*, counterintuitive ways in which the special issues might have been read more broadly by the jurors, ignored this vital contextual evidence in contravention of this Court's direction

in Boyde, Penry I and II, and Smith. The Court should grant *certiorari* to clarify that a proper Penry analysis must take account of not only what evidence was presented, but what jurors were told (and thus likely understood) about the meaning of the instructions and the scope of their sentencing discretion.

II. LEFT UNCHECKED, THE FIFTH CIRCUIT'S APPROACH WILL RESULT IN THE EXECUTION OF SCORES OF DEFENDANTS WHO WERE DENIED MEANINGFUL CONSIDERATION OF THEIR MITIGATING EVIDENCE.

It is understandable that this Court may ask how many times it must spend its resources reviewing death sentences imposed under a capital sentencing statute that was rightly jettisoned fifteen years ago. After all, as the Court observed in Penry II, Texas fixed the constitutional flaw in its statute in 1991. Penry II, 532 U.S. at 803. Today, jurors in every Texas capital case – like those in every capital case everywhere else in the U.S. – are provided an unambiguous and appropriately broad vehicle for giving *direct* mitigating effect to evidence about the defendant's character and background. No defendants in the future will suffer Petitioner's fate of being sentenced to death by jurors unable to give meaningful consideration to evidence of a deprived background, psychological problems, and neurologically impaired impulse control.

Nevertheless, the size and scope of the continuing "Penry problem" warrants this Court's intervention. At oral argument in Tennard in March 2004, the Court asked how many prisoners sentenced under the pre-1991 statute remain on Texas' death row. Counsel for Respondent answered, "By my last count there are approximately 100 ... on [d]eath [r]ow in Texas who were sentenced under this [pre-1991] sentencing scheme ...." Transcript of Oral Argument, Tennard v. Dretke, 2004 WL 720119 at *43. Petitioner's counsel estimated the number at "closer to 50." Id. at

•51. Information available online from the Texas Department of Criminal Justice indicates that 65 to 70 prisoners on Texas' current death row were sentenced under the pre-1991 statute (*i.e.*, were sentenced for offenses committed prior to September 1, 1991). Regardless of which of these numbers is correct, any of them would represent a substantial proportion of Texas' death row, one of the largest in the Nation. Indeed, the group of Texas prisoners who stand to be affected by a decision resolving the scope of Penry is larger than the entire death rows of many States, making the issue presented by Petitioner's case not just important, but certain to recur before this Court.[11]

Finally, it should make no difference that the *en banc* Fifth Circuit is presently weighing the scope of Penry in Nelson v. Dretke, No. 02-11096. After this Court granted *certiorari* and remanded for further consideration in light of Tennard, *see* Nelson v. Dretke, 542 U.S. 934 (2004), the Fifth Circuit initially denied relief in an opinion generally indistinguishable from its other post-Smith decisions, finding that Nelson's evidence of severe borderline personality disorder and childhood deprivation and mistreatment could be given mitigating effect under the "deliberateness" and "future dangerousness" questions. *See* Nelson v. Dretke, 442 F.3d 282 (5th Cir. 2006). Two weeks later, however, rehearing *en banc* was granted *sua sponte*. Nelson v. Dretke, 442 F.3d 912 (5th Cir. 2006).

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[11] Counsel is aware of at least seven other Penry cases presently pending in the Fifth Circuit alone, in addition to three in (or coming to) this Court. Those pending in the Fifth Circuit include Coble v. Dretke, No. 01-50010 (pending on petition for rehearing; *see* Coble v. Dretke, 444 F.3d 345 (5th Cir. 2006) (denying Penry claim premised on evidence of child abuse, mental disorder, and good character); Mines v. Dretke, No. 03-11137 (*see* Mines v. Dretke, 118 Fed.Appx. 806 (5th Cir. 2004) (unpublished) (granting COA on Penry claim based on evidence of episodic mental disorder)); Chambers v. Dretke, No. 03-11248 (see Chambers v. Dretke, 145 Fed.Appx. 468 (5th Cir. 2005) (unpublished) (granting COA on Penry claim based on evidence of deprived background and positive family relationships)); R.G. Smith v. Dretke, *supra*; Bower v. Dretke, No. 03-40980 (*see* Bower v. Dretke, 145 Fed.Appx. 879 (5th Cir. 2005) (denying COA on Penry claim premised on evidence of good character); Reed v. Dretke, No. 05-70046; and Garcia v. Dretke, No. 03-11097. The cases in this Court include Petitioner's case, Brewer v. Dretke, *supra*; and Summers v. Dretke, No. 05-11074,

Petitioner respectfully submits that this Court should not defer action in his case in the hope that the *en banc* decision in Nelson might disavow the suffocatingly constricted reading of Penry that currently prevails in the Fifth Circuit. The Nelson panel opinion did not even produce a dissent, and no other Fifth Circuit case has taken this Court's opinion in Smith at its word. This issue is ripe for this Court's review *now*, in Petitioner's case.

III. THE FIFTH CIRCUIT'S APPROACH IN THESE CASES, LIKE ITS ARTICULATION OF THE "SEVERITY" AND "NEXUS" TESTS, THREATENS TO UNDERMINE THE ROLE OF INDIVIDUALIZED SENTENCING IN ENSURING A LINK BETWEEN MORAL CULPABILITY AND CAPITAL SENTENCING VERDICTS.

The Fifth Circuit's refusal to give Penry a "fair reading" even after Smith and Tennard represents a continuing failure to appreciate the significance of the individualization requirement and the vital role it plays in the structure of this Court's post-Furman capital sentencing jurisprudence. As we show below, this tendency was apparent prior to Tennard in the Fifth Circuit's rigid enforcement of its screening test for "constitutionally relevant mitigating evidence." Smith, by modeling the correct Eighth Amendment approach, provided even greater guidance for the Fifth Circuit to alter its unfounded approach. But the recrudescence of the Fifth Circuit's "uniquely severe permanent handicap" test this year, in the form of categorical *per se* rules excluding entire classes of mitigating evidence from Penry's ambit because they are not as "severe" as the particular facts of Penry itself, once again demands this Court's intervention.

As is now familiar, this Court's post-Furman cases strive to minimize arbitrariness in capital sentencing by (1) narrowing the class of "death-eligible" offenses and ensuring that particular offenders are reliably determined to fall into that class, and (2) ensuring that the sentence imposed on

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as well as Laroyce Smith's own case.

a particular offender represents a "reasoned moral response" to his unique background and character and the circumstances of the offense. *See, e.g.*, Tuilaepa v. California, 512 U.S. 967, 972 (1994) (describing "eligibility" and "selection" decisions). With respect to the latter process, this Court has stated that "[w]hat is important at the selection stage is an *individualized* determination [of the appropriate sentence] on the basis of the character of the individual and the circumstances of the crime." Id.(emphasis in original; citations omitted).

In light of this longstanding emphasis on capital sentencing as an "*individualized* determination" of the appropriate sentence, perhaps the most grave problem with the Fifth Circuit's initial response to Penry was its development of a rigid "screening test" to exclude most types of evidence *ex ante* from consideration as potentially Penry-problematic. The screening test defined as "constitutionally relevant mitigating evidence" only those conditions which amounted to a "uniquely severe permanent handicap," with which the defendant was burdened through no fault of his own and which bore a causal "nexus" to the crime. *See* Tennard, 542 U.S. at 283-84. As this Court recognized in Tennard, such a "restrictive gloss" had the effect of foreclosing relief under Penry before the reviewing court even undertook any analysis of the adequacy of the pre-1991 "special issues" to accommodate the defendant's particular mitigating evidence. Id. at 286. It thereby short-circuited the process of ensuring that the jury had made an appropriately individualized judgment about the defendant's sentence.

It is now clear that in response to Tennard (and in willful ignorance of Smith), the Fifth Circuit has simply transformed its former "screening test" into a set of *per se* rules for denying Penry claims "on the merits." In every case in which the court below has refused Penry relief in the face of

mitigating evidence of childhood deprivation or abuse and/or mental disorder, it has attempted to distinguish Penry with the observation that the defendant's mitigating evidence is not as "severe" as Penry's, often by focusing on the defendant's ability to "learn from his mistakes." *See, e.g.*, Cole, 418 F.3d at 506 ("Unlike the evidence in Penry, Cole's mitigating evidence did not suggest that he was unable to learn from his mistakes"); Coble, 444 F.3d at 362 ("Coble's evidence is distinguishable from that in Penry [, which] resulted in a mental impairment that caused Penry to be in some way unable to learn from his mistakes. It is this inability to learn from one's mistakes that suggests a 'yes' to the future dangerousness [issue] and prevents the jury from being able to properly consider the defendant's abusive childhood as mitigating evidence. Coble does not argue that his troubled childhood resulted in any mental impairment that prevented him from learning from his mistakes.") (citation omitted); Brewer, F.3d at 281 ("mental illness [is not] tantamount to mental retardation for the purposes of our [Penry] case law"), id. ("There does not appear to be one iota of evidence suggesting either that Brewer's [clinical depression] is permanent or that he experienced cognitive limitations of any sort as a result of it").

This approach fails to grasp the profound importance of ensuring that every defendant sentenced under the pre-1991 statute was, *in fact*, treated individually – as the Eighth Amendment requires. As Smith emphasizes, jury instructions that afford "*full* consideration and *full* effect" to proffered mitigating evidence are important not for their own sake, but because giving the jury a direct and unambiguous vehicle for responding to mitigating evidence is essential to the task of "choosing the defendant's appropriate sentence." 543 U.S. at 38. The Fifth Circuit's mechanistic approach, under which any evidence not identical to Penry's is treated automatically as falling outside the ambit of Penry and Smith, fails to accord due regard to genuine individualization as an

indispensable feature of a constitutionally adequate capital sentencing system. *See* Eddings v. Oklahoma, 455 U.S. 104, 119 (1982) (O'Connor, J., concurring) (Eighth Amendment "require[s] us to remove any legitimate basis for finding ambiguity concerning the factors actually considered" by the sentencing authority at trial). The resulting systemic failure to protect the right to individualized sentencing, and thereby ensure a strong link between moral culpability and resulting sentencing verdicts, is a serious matter that warrants plenary review by this Court. *Cf.* Ring v. Arizona, 536 U.S. 584, 618 (2002) (Breyer, J., concurring) (diversity of views in the U.S. about the propriety of capital punishment "argues strongly for procedures that will help assure that, in a particular case, the community indeed believes application of the death penalty is appropriate ....").

CONCLUSION AND PRAYER FOR RELIEF

Petitioner's sentencing hearing was marred by exactly the same constitutional flaw as those in Penry and Smith – jurors heard mitigating evidence that could well have persuaded them to spare Petitioner's life, but were limited to instructions that gave them no vehicle for expressing that conclusion. This Court can have no confidence that Petitioner's death sentence represents the jury's actual conclusion that a death sentence was the *appropriate* punishment for his role in the crime. *Cf.* Smith.

This Court has explained that "[m]itigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." Williams, 529 U.S. at 398. Equally important, a defendant's "reduced capacity for considered choice" and his "emotional history" both "bear directly on the fundamental justice of imposing capital punishment." Skipper v. South Carolina, 476 U.S. 1, 13-14 (1986) (Powell, J., concurring in judgment). Faithful adherence to those insights suggests the importance of reviewing – and

reversing – the Fifth Circuit's decision in Petitioner's case.

For the reasons set forth above, Petitioner respectfully prays that this Court grant a writ of *certiorari* to give plenary review to the judgment below. In the alternative, if the Court elects to consider the proper scope of Penry I in another case, Petitioner prays that the Court hold his case pending that decision;[12] or summarily reverse the judgment below; or grant such other relief as justice requires.

Respectfully submitted,

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[12] We expect the coming weeks will see petitions to this Court from numerous death-sentenced Texas prisoners seeking review of Penry issues denied by the Fifth Circuit or the Texas Court of Criminal Appeals, including one (Coble) who faces an August 30 execution date.